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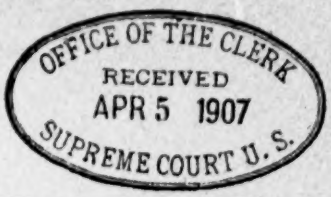

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 188.

THE UNITED STATES, APPELLANT,

vs.

BETHLEHEM STEEL CO.

APPELLEE'S PETITION FOR REHEARING.

JAMES H. HAYDEN,
Of Counsel for Appellee.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 25977

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Now comes the appellee and respectfully prays the court to restore the above cause to the docket and order a reargument thereof.

A rehearing of the cause is sought by the appellee upon the following propositions:

1. The contract in suit is free of ambiguity and there was no occasion or justification for a resort to the preliminary correspondence of the parties and other extraneous matter to ascertain its meaning.

2. The contract in suit authorized the Chief of Ordnance, U. S. Army, to reduce the compensation payable to the contractor, in the event of the latter's default, by the imposition of penalty. The term "penalty" was used by the parties in the contract and in their correspondence. There is no justification for supposing that either of them executed the contract in ignorance of its meaning or that the contract as written did not express their intention. The fact that the financial result would have been more satisfactory to the United States if the contract had provided for the deduction of liquidated damages, instead of penalty, cannot be taken

as proof that the parties believed the terms "penalty" and "liquidated damages" to be synonymous.

3. The deduction authorized to be made from the contractor's compensation, in case of delay, was not based upon any estimate of the value to the United States of the gun carriages, nor upon any agreement of the parties fixing the amount of damage that delay in their delivery would cause the United States; hence the penal clause of the contract lacked the most essential element of a stipulation for liquidated damages.

4. The facts established by the finding of the Court of Claims (VIII) do not show that the claimant made default to the extent of 600 days. Such default alone could justify the deduction of $21,000 made by the United States from the claimant's compensation.

JAMES H. HAYDEN,
Of Counsel for the Appellee.

CERTIFICATE OF COUNSEL.

The undersigned, a member of the bar of this honorable court, believing that the foregoing petition possesses merit and warrants the granting of a reargument of this cause, respectfully certifies accordingly.

JAMES H. HAYDEN.

BRIEF IN SUPPORT OF APPELLEE'S PETITION FOR REHEARING.

It appears from the opinion of the court that its decision turned upon three questions:

1. Whether or not the penal clause of the contract was ambiguous, and hence whether or not resort could be had to the correspondence between the parties and certain alternative bids, which preceded the execution of the contract and none of which was incorporated or referred to therein, for purposes of interpretation.

2. Whether or not, considering the contract by itself or in connection with the preliminary correspondence and alternative bids, the term *"penalty"* can be interpreted to mean *"liquidated damages."*

3. Whether or not the Court of Claims, by its eighth finding of fact, determined that the Bethlehem Company was responsible for delay in the performance of its contract, to the extent of at least 600 days.

I.

Whether or not the penal clause of the contract was ambiguous, and hence whether or not resort could be had to the correspondence between the parties and certain alternative bids, which preceded the execution of the contract and none of which was incorporated or referred to therein, for purposes of interpretation.

By reading into the contract in suit the correspondence between the Chief of Ordnance and the Bethlehem Company and the three alternative bids, which were rejected, for the purpose of interpreting the penal clause, the court has re-

pudiated the doctrine followed by it and by the Court of Claims, to the effect that, in the absence of ambiguity on the face of a contract, no resort can be had to proposals, or the preliminary correspondence between the parties, which were not incorporated in the contract.

In many such actions claimants have urged the court to consider transactions of that kind on the plea that they disclosed matters of inducement or showed that the contracts had been entered into by the parties laboring under a mistake of fact. In all of these cases the United States has stubbornly contended for a strict enforcement of the common-law rule, and it has always been sustained in that contention. As one of the learned justices remarked at the hearing of this case, "It is a poor rule that does not work both ways;" yet here we find the government, for reasons of convenience, calling upon the court to make an exception in its favor, and I respectfully submit that by the decision of this honorable court, such an exception has been made.

I submit that the meaning of the term "penalty" has been well understood for years. Its meaning, when used as it was in the contract now under consideration, has been stated by this court and the Court of Claims, and should have been known to all of the executive departments of the government. I submit that the contract was free of ambiguity, and that there was no justification for a resort to the preliminary transactions.

In the case of *Brawley v. U. S.* (96 *U. S.*, 168, 173), cited in the present opinion, the principal question related to the admissibility of correspondence which led to the making of the contract. The court said:

> "All this is irrelevant matter. The written contract merged all previous negotiations and is presumed in law to express the final understanding of the parties. If the contract did not express the true agreement, it was the claimant's folly to have signed it. The court cannot be governed by any such outside considerations. Previous and contemporary

> transactions and facts may be very properly taken into consideration to ascertain the subject-matter of a contract and the sense in which the parties may have used particular terms, *but not to alter or modify the plain language which they have used.*"

It is respectfully suggested that the court has overlooked the last clause of this quotation, which materially qualifies the dictum which preceded it. The last clause set forth the rule which the court followed in deciding the case. It is directly opposed to the contention of the United States in the case at bar. The language of the contract involved in the Brawley case was far less explicit and offered better excuse for a resort to extraneous matter than the language employed in the contract of the Bethlehem Company.

On this question, the court cited, also, the case of *Greenlief W. Simpson v. U. S.* (199 *U. S.*, 397, 399). That grew out of a contract to supply beef to the United States forces in Cuba "at such posts and camps as are situated in the interior of the Island." The United States refused to take beef tendered at a camp situated two and one-half miles from the seacoast. On this refusal Simpson based his claim for damages. The court declined to admit proof of statements made by the Commissary General to Simpson before the contract was signed, but finding the clause "at such posts and camps as are situated in the interior of the island" ambiguous, it resorted to an advertisement under which Simpson had made his bid, though not the one referred to in his contract. The former advertisement described the places where he was to supply beef as "posts remote from the seacoast," and held that when interpreted in the light of the first advertisement, and of the construction placed upon it by army officers during the performance of the contract, in which construction Simpson tacitly acquiesced, the contract did not entitle the claimant to furnish beef at the post in question. The language used in Simpson's contract was ambiguous and the court's ruling in his case cannot serve

as an authority for the case at bar. Beside that, there was not in the present case, as there was in Simpson's, a practical construction of the contract by the parties. It was not until the Bethlehem Company had performed the contract fully on its part that the government refused to pay the full price stipulated, claiming that the "penalty" provided for was, or of right ought to be, the same thing as *liquidated damages*.

In the case of *J. E. Simpson & Co. v. U. S.* (172 *U. S.*, 372, 379), it appeared that the advertisement tendered to prospective bidders information with regard to the site on which the government desired to have constructed a dry-dock. A profile of the dock site was made by the Navy Department and exhibited by it to the Simpsons and other intending bidders for their information and guidance in estimating the character and extent of the work called for. The Simpsons accepted the showing made by the profile as correct and were governed by it. The profile was radically wrong. In consequence the contractors were obliged to furnish a great amount of labor and material which would not have been needed if the site had been as represented. In the Simpsons' bid and in the specifications attached to the contract, it was provided that the government should furnish an *"available site"* for the dock. Contractors contended that the term "available site" was intended to mean a site like the one shown by the profile, which presented no grave engineering difficulties. The court held that the term "available site" was not ambiguous, and meant, simply, a site, which should be selected as convenient for the government in the operation of its navy yard. It declined to consider the transactions of the parties which preceded the execution of the contract. Mr. Justice White, delivering the opinion of the court, said:

> "The rule by which parties to a certain contract are bound by its terms, and which holds that they cannot be heard to vary by parole its express and

> unambiguous stipulations, *or impair the obligations which the contract engenders, by reference to the negotiations which preceded the making of the contract or by urging that the pecuniary result which the contract has produced has not come up to the expectations of one or both of the parties, is too elementary to require anything but statement.*"

This authority, I submit, is on all fours with the case at bar, and that there is less reason for going outside the contract to find what may have been meant by the word "penalty" than there was to find the sense in which the word "available" was used.

Although the Attorney General stated that, when Secretary of the Navy, in 1905, he had found it necessary to revise the forms of contract used in his department in order that they should provide for liquidated damages and not merely penalty, this court cannot assume that in 1898 the Chief of Ordnance of the Army *and the Bethlehem Iron Company* did not understand the difference between the two terms.

I submit that, in going outside the contract and reading into it proposals and correspondence which preceded its execution, the court has *first created an ambiguity,* and thereupon proceeded to remove it, basing its interpretation of the instrument upon the extraneous matter, which was not made part of it and was never intended to be part of it. This the court has declared to be "irregular" *(Van Buren vs. Digges,* 11 *How'd,* 461).

The court in its opinion states that courts are now inclined to allow the parties to carry out their own intentions as set forth in their contracts. That is precisely what I am contending for. A *penalty* was provided for in the contract, and nowhere in the contract is there a suggestion that something else was intended.

II.

Whether or not, considering the contract by itself or in connection with the preliminary correspondence and alternative bids, the term "penalty" can be interpreted to mean "liquidated damages."

In holding that the parties, who consistently used the term "penalty" throughout their preliminary correspondence and in their contract, did not understand "the technical and legal difference between penalty and liquidated damages," and that they must in fact have meant liquidated damages, this court has repudiated a doctrine often announced by it and followed by other courts. (*Taylor v. Sandiford* (7 *Wheat.*, 13, 17), *Van Buren v. Digges*, 11 *How.*, 461, 466, and many other cases cited in the appellee's brief.)

In discussing this departure from the old doctrine, the court cites the case of *Sun Printing & Publishing Association v. Moore* (183 *U. S.*, 642, 669), where the facts and subject-matter were so widely different from those in the present case that no reasonable analogy can be discovered. That case grew out of the hiring of a yacht, to be used by the war correspondents of a newspaper, during our war with Spain, in waters likely to be frequented by Spanish naval vessels. The extraordinary risks attending such employment were well understood when the contracting parties, as bailor and bailee, agreed upon the value of the yacht. The damage that the owner would sustain in case of the charterer's default, namely, his failure to return the vessel, was easily ascertainable. Both parties had every opportunity to appraise the yacht, and by their contract fixed her value, just as they would have done if she were being sold.

In the case at bar there was nothing of this kind. The Bethlehem Company delivered the gun carriages called for by the contract, and they were accepted without protest.

The naming of a certain rate of penalty for delay was based on nothing tangible, and there is no pretense that it had any relation whatever to the amount of damage or loss that the United States would suffer on account of delay. The court says that the rate of penalty was arrived at "by figuring the average difference in time of delivery between the price bid for slow delivery of the carriages and the price under the accepted bid, the department saying: 'that this average difference should be the prescribed penalty.'" This assuredly was not a basis by which it was possible to appraise the government's damage. If the department had wished to provide that the amount of the contractor's compensation should depend upon the rapidity of its work, is it not reasonable to suppose that all four of the company's bids would have been accepted, and that in the contract itself there would have been set out a scale of prices providing increased compensation for increased expedition in delivery? There is no suggestion of anything of that kind in the contract, nor was any intimation of that sort given the contractor until its work was done and it came time for the government to make settlement. In its opinion in the case of the *Sun Publishing Company*, the Court made an extensive review of the authorities dealing with the question of penalty and liquidated damages. Among those cited with approval are *Tayloe v. Sandiford* and *Van Buren v. Digges (supra)*. Both were cited and quoted by this appellee and support its contention that a contract providing for penalty alone does not authorize the deduction of liquidated damages, and that the parties are bound by their contract. Some American and English cases are referred to wherein the courts have sustained stipulations for liquidated damages; but in these the contracts considered showed that the parties had agreed upon the amount of damages that the one would suffer from the other's default. The courts did no more than enforce the contracts according to their terms.

In the case at bar the court says that "it would have been very unusual to allow the company to obtain a contract for the construction of these carriages and yet to place it under no liability to fulfill it as to the time of delivery, specially agreed upon, other than to pay only those actual damages (not exceeding $35 per day) which might be proved were naturally and proximately caused by the failure to deliver. The provision, under such circumstances, would be of no real value." It is a fact that such contracts are or were common. The Attorney General said so in the course of his argument. I respectfully submit that a provision making a contractor liable for the cost of extra inspection and all other actual damage that the government may sustain in consequence of the contractor's default has value. I submit, however, that all of this is immaterial. In the case of *Sun Printing & Publishing Co.* this court cited with approval the opinion in *Dakin v. Williams,* (17 *Wend.,* 447), where it was said:

> *"A court of law possesses no dispensing powers. It cannot inquire whether the parties have acted wisely or rashly in respect to any stipulation they may have thought proper to introduce into their agreements."*

The court also states that "if the contract were construed as contended for by the Bethlehem Company, it would receive (as events have turned out) the highest price for the longest time in which to deliver, which could not have been contemplated by either party." It cannot be assumed that either party contemplated the various delays caused by the government as well as by the company. The government agreed to pay $216,000 for the six gun carriages. It has paid for them only $195,000. The government suffered no damage in consequence of delay. The fact that the delays attributed by the Court of Claims to both parties, create a situation in which the company is entitled to receive the highest price for work done in consequence of mutual de-

linquencies in slow time is not a matter which can be considered in determining what was the intention of the parties expressed in their contract before the work was begun.

The court calls attention to the preparations for war which were in progress when the contract was signed as indicating the government's reason for wishing to receive the gun carriages as soon as possible and its willingness to pay a higher price for them if delivered quickly. Do not these facts furnish additional reasons why the department should have so drawn the contract that the contractor might have expected a deduction of liquidated damages in case of his default.

Again, if such extraneous facts as these are to be considered, must not this court consider also the conditions that developed when the work contracted for was being done. Then, the war being over, the government had no urgent need for the gun carriages—in fact, was not prepared to use them—so, instead of permitting the Bethlehem Company to complete the work as rapidly as possible, the government's agents "hindered and delayed the claimant" by ordering "changes in the plans of construction and in various other ways" (Finding VIII).

III.

Whether or not the Court of Claims, by its eighth finding of fact, determined that the Bethlehem Company was responsible for delay in the performance of its contract to the extent of at least 600 *days.*

In ordering the dismissal of the petition this court in effect has made a finding of fact to the effect that the completion of the gun carriages was delayed for 600 days through the Bethlehem Company's fault. On no other hypothesis could the court sanction the deduction of $21,000 from the com-

pany's compensation. The finding of the Court of Claims, which is conclusive on this appeal, did not state that the company was answerable for delay to the extent of 600 days. The finding reads (VIII):

> "The court finds as the ultimate fact that the defendants' officers hindered and delayed the claimant in the performance of the work by changes in the plans of construction, as alleged in the petition, and in various other ways; but the court also finds that the claimant contributed to the delay in the completion of the work by being insufficiently equipped and prepared to complete it within the time prescribed in the contract and by taking other work to the exclusion of that referred to in these findings; and the court further finds that the transactions in the process of manufacture were so involved and intermerged *that it is impossible, on the evidence produced, for the court to ascertain and determine whether the defendants (United States) should be charged with a greater proportion of the delays set forth in the foregoing table in Finding VII than those assumed by the defendants' officers, to wit,* 496 *days out of the total amount of delays, to wit,* 1,096 *days.*
>
> "It does not appear that the defendants were ready to use the gun carriages hereinbefore described; nor does it appear that they could have used them on their fortifications if they had been delivered at an earlier day. Nor does it appear that the defendants suffered any injury or damage whatever by the delay of the claimant in delivering the said gun carriages hereinbefore set forth."

This means no more than that the government was responsible for *at least* 496 days of the delay and that the responsibility for the remaining 600 days' delay could not be apportioned between the parties. The Chief of Ordnance was not an arbitrator and his arbitrary ruling is not binding. The amount of the claimant's responsibility remains undetermined. But, nevertheless, by the judgment of this court,

the company stands mulcted in damages as for an ascertained default, while the government retains the gun carriages and over 10 per centum of the contract price.

I submit that a case of such importance to the United States and to the claimant, involving principles which must govern the interpretation of many existing contracts made by persons who entered into them relying upon earlier decisions of this court and of the Court of Claims, should not be dismissed without a thorough hearing upon and consideration of the propositions of law and fact above discussed.

JAMES H. HAYDEN,
Of Counsel for Appellee.